

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

BEAL DISTRIBUTING, INC.

Employer

and

GENERAL DRIVERS AND HELPERS UNION
LOCAL 749, affiliated with the
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS¹

Petitioner

Case 18-RC-17312

DECISION AND DIRECTION OF ELECTION

Petitioner seeks an election in a unit of full-time and regular part-time merchandisers, relief drivers, sales service representatives, warehousemen, draft line cleaners and pre-salesmen employed by the Employer at its 3301 North Markey Avenue, Sioux Falls, South Dakota facility; excluding office clerical employees, sign makers, contemporary marketing technicians, managers, guards and supervisors as defined in the National Labor Relations Act, as amended.

The Employer agrees that the unit sought by Petitioner is appropriate, except that the Employer contends that the pre-salesmen are supervisors as defined in Section 2(11) of the Act. In addition, Petitioner and Employer disagree on the supervisory status of the relief pre-sales express route supervisor and the day shift supervisor, both

¹ Petitioner's name appears as amended at the hearing.

of whom the Employer would exclude.

After reviewing the record, I conclude that the Employer has failed to establish that the pre-salesmen, relief pre-sales express route supervisor or the day shift supervisor are supervisors as defined in the Act. Therefore, I will order an election in the unit sought by Petitioner - which includes the pre-salesmen. Also eligible to vote are the relief pre-sales express route supervisor and the day shift supervisor.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The first section of this decision will describe the Employer's business, including an overview of its department and supervisory structure. The second section

² The Employer, Beal Distributing, Inc., is a Minnesota corporation with a facility located in Sioux Falls, South Dakota, where the Employer is engaged in the wholesale sales and distribution of beer. During the past 12 months, a representative period, the Employer purchased goods valued in excess of \$50,000 from suppliers located outside the State of South Dakota, which goods were shipped directly to its South Dakota facility.

will focus on the Employer's sales department, including its functions and composition. Next, I will explain the jobs of the pre-salesmen, including their working relationship with the sales service representatives (SSRs). The fourth section will describe the Employer's contention and evidence regarding the supervisory status of the pre-salesmen. Fifth, I will explain my conclusion that the evidence is insufficient to establish that pre-salesmen are supervisors as defined in the Act. Finally, I will review the evidence regarding the jobs of the relief pre-sales express route supervisor and day shift supervisor, and explain my conclusions that the evidence is insufficient to establish that they are supervisors as defined in the Act.

The Employer's Business

The Employer is a wholesale beer distributor for Anheuser-Busch and other (unidentified) smaller brewers. The Employer is the exclusive distributor for Anheuser-Busch products in Sioux Falls, South Dakota and a surrounding 50-mile radius from Sioux Falls. The Employer sells, advertises, promotes, rotates and delivers product to both on and off-sale operations. On-sale operations are bars and restaurants. Off-sale operations include convenience and grocery stores.

Arch Beal is the Employer's president, and overall manager of the operation. Reporting directly to Beal are Sales Manager Larry Johns and Warehouse Manager Rick Wooledge.³

The Employer's days of operation are Mondays through Fridays and 8:30 a.m. until noon on Saturdays. The Employer is not open on Saturdays after 12:00 (noon) or Sundays, although someone is available to take emergency calls from customers.

³ The record contains no information about the office clerical staff or supervision of the office staff.

The Employer's Sales Department

As stated above, Larry Johns manages the Employer's sales department. Reporting to Johns are Tom Brown (consumer awareness education and training supervisor), Phil Swanson (draft manager), Jack Kolbeck (key accounts manager), and three team leaders. Reporting to Tom Brown (but on the same level as Brown on the Employer's organizational chart) is Kacey Phillips (shelf set-up manager). The Employer and Petitioner stipulated that Johns, Brown, Swanson, Kolbeck, the three team leaders and Phillips are supervisors within the meaning of the Act. Finally, also reporting to Johns is Jeff Young (relief pre-sales express route supervisor), whose supervisory status is in dispute.

Also in the sales department are eight pre-salesmen, all of whom are supervisors according to the Employer. In addition, one employee (Al Gehake) functions as both a pre-salesman and an SSR. Apparently, both the Employer and Petitioner would include him in the unit. The sales department also includes eight SSRs who work directly with assigned pre-salesmen, two SSRs on the relief team, one pre-salesman on the relief team, and four SSRs and merchandisers on the express route team. It appears the Employer and Petitioner also agree on the inclusion of these 15 employees, for a total of 16 employees that the parties agree are in the unit.

Thus, excluding Draft Manager Phil Swanson, who appears to have no supervisory or managerial functions related to SSRs, the Employer's position is that there are 16 supervisors/managers for 16 unit employees.

Both SSRs and pre-salesmen are salaried. However, unlike SSRs, 10-20 percent of pre-salesmen's earnings are tied to performance, which is largely determined by sales and merchandising efforts. SSRs and pre-salesmen attend the same sales meetings, although SSRs might be excused about halfway through some meetings. There is no evidence in the record about fringe benefits.

Basically, pre-salesmen visit customers and generate orders. SSRs drive the trucks and deliver the products. Each pre-salesman is assigned to a specific SSR. Orders generated by a pre-salesman one day are delivered by the SSR the next day.

The Pre-Salesmen Jobs

The eight pre-salesmen are each assigned a geographical area containing a mix of large and small accounts. Their jobs are to visit customers in their assigned areas; sell product; take care of promotions, merchandising and marketing; and determine whether product needs to be rotated because the product is nearing its expiration date. Ideally, in that situation, product is rotated from a customer where product is moving slowly to a customer where product turnover is more rapid.

A typical day for a pre-salesman includes a stop at the Employer's facility to pick up a computer order taking unit, items for advertising and promotion, and a company van. Then the pre-salesman checks with the SSR assigned to his route to find out about the previous day's deliveries and to advise the SSR of anything the SSR might need for that day's routes. Next, the salesman checks with his team leader for an update. After these matters are taken care of, the pre-salesman leaves the Employer's facility and makes sales calls. Finally, at the end of the day, the pre-salesman returns

to the Employer's facility to finalize notes and provide any information that the SSR might need for the next day.

The Employer maintains that the pre-salesmen have "free reign" on merchandising, and therefore exercise independent judgment. In fact, however, that "free reign" is subject to the desires of the customers. That is, as pre-salesmen visit customers, they will encourage customers to order product, to utilize certain displays and promotions, and how to best merchandise the Employer's product. However, pre-salesmen ultimately meet the customers' needs. Moreover, the price charged customers by the Employer for the product is the same. If price promotions are available, they are available to all customers. Ultimately, the customer decides the price to charge the consumer (as long as it is not below cost), what products to feature, and how to feature them.

Pre-salesmen enter customer orders on hand-held computers. They also enter into the computer any notes regarding customer requests. The Employer's computer system then generates pick tickets. Pick tickets tell warehouse employees how much product to load and tell SSRs where and how much product to deliver. The pick tickets might also advise SSRs of delivery instructions made by the customer, and give SSRs instructions on where displays are to be located and how they should look. These instructions contained on the pick tickets are augmented by telephone contact between the pre-salesmen and SSRs and by conversations at the beginnings and ends of the workdays.

SSRs make the deliveries, put in place special signage or merchandising (per the pre-salesmen's instructions), and rotate stock. The SSRs also collect money from

customers. Generally, if SSRs have unexpected problems at customers, they are to contact their pre-salesmen by telephone for assistance. These problems might include customers changing the amount of product desired or customers wishing to charge a different price than discussed with the pre-salesmen.

The Employer's Contentions and Evidence Regarding the Supervisory Status of Pre-Salesmen

The Employer does not contend, and there is no record evidence to even suggest, that pre-salesmen hire, fire, suspend, discipline, lay off, recall, promote, reward, determine wage rates or labor relations policies, adjust grievances, grant time off, schedule hours of work, evaluate, authorize overtime or in other way affect any employees' working conditions. Rather, the Employer's contentions relate to alleged recommendations made by pre-salesmen.

The record is clear that team leaders, and not pre-salesmen, evaluate SSRs. However, according to some limited testimony in the record, team leaders ask pre-salesmen about the performance of SSRs when evaluating SSRs. What weight is given to the feedback provided by pre-salesmen is not established. Moreover, the record is clear the team leaders ride along with SSRs (and pre-salesmen) on their routes at least once a month. In addition, at most, each team leader has six SSRs and pre-salesmen reporting to them. Finally, the record fails to reveal what role (if any) evaluations play in giving SSRs wage increases.

The record is also clear that Sales Manager Larry Johns, and not the pre-salesmen, hires employees (and even Johns needs approval from Arch Beal). However, according to the Employer, pre-salesmen have "recommended" applicants for

hire as SSRs. The problem is there is no evidence that the pre-salesmen effectively recommend the hiring of employees. Rather, the record establishes that at times pre-salesmen (and SSRs) have given the Employer names of people for the Employer to consider for jobs. Sales Manager Johns was clear that he always interviews applicants and that usually the training coordinator (apparently Brown) sits in. While Johns pointed to one example where a pre-salesman also sat in on an interview, it was only because the pre-salesman happened to be at the Employer's facility and would be working with the applicant in Brookings, South Dakota. There is no evidence that pre-salesmen routinely sit in on interviews, that SSRs are hired without interviews by at least Johns (and sometimes others), or what impact "recommendations" by pre-salesmen have in Johns' decisions to hire.

The record contains no evidence regarding discipline short of termination. The record is clear that decisions to terminate employees because of poor performance are made by Johns (in consultation with team leaders), and not by pre-salesmen. However, according to the Employer, pre-salesmen recommend that SSRs be terminated. There is no question that pre-salesmen go to their team leaders if dissatisfied with the performance of their assigned SSR (for that matter SSRs report customer complaints about pre-salesmen to team leaders also). However, the team leaders who testified made clear that these complaints do not lead to immediate termination. Rather, the team leaders increase their ride alongs with the poor performing SSRs, increase training, and otherwise investigate the complaints. In one of two examples provided in the record, the Employer did not terminate the SSR as recommended by the pre-salesman, but moved the SSR to another pre-salesman.

The Employer also contends that the pre-salesmen make sure that SSRs follow instructions and assign work to SSRs. There is no question that pre-salesmen assign work insofar as the pre-salesmen generate orders and enter customer preferences for deliveries, merchandising and promotions, and then the SSRs execute the orders. What the Employer has failed to establish is what independent judgment is required. Each pre-salesmen works with one SSR. Thus, there is no decision making regarding which SSR will do what work because each SSR does the work of only one pre-salesman. To the extent the pre-salesmen exercise independent judgment in encouraging customers to use certain displays, to order certain or more product, or to take advantage of promotions, those are functions of sales and not evidence of supervisory status.

The Employer also contends that pre-salesmen decide when they need more help. The record supports that contention, but it does not support any suggestion that the Employer automatically provides more help. This situation arises when a pre-salesman has an unexpected large order and needs additional help to make the next day's deliveries. The pre-salesman then goes to the team leader and asks for an additional SSR for the next day. If there is someone available to help out the next day, the team leader grants the request. If there isn't someone available, then no assistance is provided.

Finally, the Employer contends that pre-salesmen supervise the Employer's operation on Saturday mornings. The record reveals that one pre-salesman and one or two SSRs are assigned to work on Saturday mornings on a rotating basis. According to the Employer, the pre-salesman's job is to answer the telephone, take orders, complete

the paperwork on the orders, and give the orders to the SSR for delivery. However, there is no evidence as to what independent judgment the pre-salesman exercises on Saturday mornings. It is also difficult to imagine what independent judgment would be required on those Saturdays where one pre-salesman and one SSR work, since the pre-salesman takes the order, and the SSR delivers it. Finally, I also note that team leaders, the key accounts manager and sales manager also work on a rotating basis for the same hours on Saturday mornings as the pre-salesman and SSR.

Pre-Salesmen Are Not 2(11) Supervisors

It is the Employer's burden to establish that the pre-salesmen are supervisors within the meaning of the Act. Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip. op. at 2 (2003). As already noted, there is no evidence that pre-salesmen exercise on their own any of the indicia of supervisory status set out in Section 2(11) of the Act. Nor does the evidence support the Employer's contention that the pre-salesmen effectively recommend hiring, termination, wage increases or staffing. Rather, it is clear that pre-salesmen make suggestions, verbalize complaints, and advise managers of various problems preventing them from performing optimally. It is also clear that the Employer does not act on those suggestions, complaints or advice without conducting further investigation or without the analysis and consideration by stipulated supervisors. Thus, there is no evidence that pre-salesmen effectively recommend any Employer personnel actions because Employer managers and supervisors above the pre-salesmen do not simply rely on the statements made by the pre-salesmen. Feralloy West Co., 277 NLRB 1083, 1084 (1985) (relaying information to manager does not establish authority to discipline or effective recommendation to discipline employees); Cf. Progressive

Transportation Service, 340 NLRB No. 126 (2003) (individual effectively recommends discipline because there is no independent investigation of incidents reported to higher management).

With regard to assigning and directing work, pre-salesmen do indeed convey to SSRs what work they will perform. However, there is no evidence that the pre-salesmen exercise independent judgment in these communications. First, each pre-salesman works with only one SSR. Thus, pre-salesmen do not exercise judgment by deciding which SSR will perform a particular job or particular duties. Second, the duties performed by pre-salesmen compared to SSRs are clearly delineated. Pre-salesmen perform sales calls; they take customer orders; and they assist customers with merchandising and promotions. The next day SSRs fill the orders and follow any instructions included with the orders regarding delivery and setting up displays. Third, it is clear that the functions and communications of the pre-salesmen are typical sales functions, and not supervisory in nature. Dr Pepper Bottling Company, 228 NLRB 1119 (1977). In any event, to the extent that pre-salesmen direct the work of the SSRs, that is insufficient to establish supervisory status. There must also be evidence that in doing so, the pre-salesmen exercise independent judgment – and this record has no evidence to support such a conclusion. Alois Box Co., 326 NLRB 1177 (1998); Azusa Ranch Market, 321 NLRB 811 (1996).

Finally, the Employer's evidence that pre-salesmen wear "custom dress shirts" and not uniforms, have a performance pay plan based on sales and merchandising efforts, have business cards and modest expense accounts (unlike SSRs), is at best, secondary indicia of supervisory status. In this particular situation, in view of their sales

function, these emoluments likely reflect their status as salesmen, more than they suggest supervisory status. In any event, I note that another secondary indicia—ratio of supervisors to employees—does not support the Employer's contention that pre-salesmen are supervisors.

Relief Pre-Sales Express Route Supervisor

The Employer's relief pre-sales route supervisor is Jeff Young. In essence, Young's job has two parts. He is part of the Employer's relief pool, which consists of four employees (including Young). These employees fill in for SSRs or pre-salesmen when they are absent due to illness, vacation or training. They would also help out when a particular route needs extra assistance, particularly around busy holiday weekends or seasons. The relief pool reports directly to Sales Manager Larry Johns. Except for Young, whom the Employer contends is a supervisor, the rest of the employees in the relief pool are in the unit.

The second part of Young's job is express route supervisor. The Employer contends Young spends 50 percent of his time on this part of his job. Express routes handle major customers, like Wal-Mart, Sam's Club and major grocery stores. There are two express routes, with two SSRs assigned to each express route. The express route SSRs do the same jobs as other SSRs, only there is more volume per customer and broader selection of product by the customers. The customers are still serviced by pre-salesmen.

There is no testimony or evidence that Young hires, fires, disciplines, transfers, lays off, recalls, promotes, rewards, determines wage rates, adjust grievances, grants time off, evaluates, or schedules express route SSRs, or effectively recommends any of

these actions. Rather, the Employer contends that Young rides with the express route SSRs, trains them, and makes sure that they are following directions from pre-salesmen. The problem is that the record does not establish that Young exercises independent judgment in training SSRs or assessing their work. The record also does not explain what occurs if Young discovers the express route drivers are not doing their jobs properly, particularly as there is no claim that Young either disciplines or effectively disciplines employees. Moreover, Sales Manager Johns acknowledged that the key account manager visits these customers' facilities a great deal and that "we all" keep an eye on the express route accounts. F.A. Bartlett Tree Expert Co., 325 NLRB 243, fn. 1 (1997) (training of employees does not, without more, establish supervisory status).

In conclusion, the Employer failed to establish that Young exercises independent judgment in his limited oversight of express route SSRs.

Day Shift Supervisor

The day shift supervisor is Tim Wollum. He works in the warehouse, and reports directly to Warehouse Manager Rick Woledge. Neither Wollum nor Woledge testified at the hearing in this matter. Instead the Employer's evidence is solely the testimony of Sales Manager Larry Johns.

There is no evidence that Wollum hires, fires, disciplines, transfers, lays off, recalls, promotes, rewards, establishes wage rates, adjusts grievances, schedules hours of work, authorizes overtime or evaluates any employees, or that he effectively recommends Employer action in any of these areas. Rather, the Employer contends that Wollum is a supervisor because he supervises the day crew from 5:00 a.m. until 7:30 a.m., when Warehouse Manager Woledge arrives for work.

The warehouse operation consists of Wooledge, two individuals with the titles of supervisors, and seven employees. Wollum is the day shift supervisor, and there are four employees on the day shift. Dave Hackrott is the night shift supervisor, and there are three employees on the night shift. The day shift operates from 5:00 a.m. until 2:30 p.m., and the night shift from 2:00 p.m. until about 10:00 p.m. Wooledge works from about 7:30 a.m. until about 5:00 p.m. Petitioner and the Employer stipulated to the supervisory status of Hackrott, whose position on the Employer's organizational chart is the same as Wollum. However, there is no record evidence regarding Hackrott's duties, so I am unable to explain why Petitioner believes Hackrott is a supervisor but Wollum is not a supervisor.

At the start of his workday, Wollum unlocks the Employer's facility so he and the day shift crew can begin the day. The substance of Wooledge's testimony regarding Wollum's job before Wooledge arrives is: "Tim supervises that crew...He would in the morning make sure that all of his people are there...he would make sure that if there's anything that needs to be done for those trucks in the morning he's making sure those messages (customers leaving beer orders) are picked up and directed to the proper trucks. He would also make sure that after the trucks are loaded the other day operators are - instructed as to what beer to unload from our inbound -and where that's put away...I guess (he has) just general supervisory duties that—to make sure things flow." The only other testimony regarding Wollum is that if an employee calls in sick Wollum can either reassign responsibilities to cover for that absent employee or call the warehouse manager and work out a method for getting a replacement employee.

After Wooledge arrives, Wollum is responsible for tracing inventory, including performing daily counts. He is also responsible for incoming freight. Johns also testified that Wollum “troubleshoots” for Wooledge, when Wooledge is absent from the facility. The frequency of Wooledge’s absences is not in the record, but it would include when Wooledge is picking up parts for the repair of trucks, or involved in some aspect of repairs being performed away from the Employer’s facility.

Wollum is hourly paid, as are the other warehouse employees. He is entitled to overtime pay, as are the other warehouse employees.

I conclude that the Employer has failed to meet its burden of establishing Wollum’s supervisory status. The only evidence (other than conclusionary testimony by Johns) suggesting supervisory status is that Wollum is responsible for making sure the trucks get loaded with product for customers (which is also done on the night shift) and that product from brewers get unloaded, from 5:00 a.m. until Wooledge arrives at about 7:30 a.m. While the Employer contends that if Wollum is not a supervisor then there is no supervisor present for the first two and one-half hours of the day shift’s workday, that contention is undercut by the fact that Wollum contacts the warehouse manager in the event he needs a replacement employee. While Johns also suggests that Wollum assigns and directs work prior to Wooledge’s arrival, the testimony is so vague that it is not clear how Wollum assigns or directs work, let alone whether he exercises independent judgment when he does so. J.C. Brock Corp., 314 NLRB 157 (1994) (directing employees and making sure work is completed is insufficient to establish supervisory status where no evidence that individual exercises independent judgment); Quadrex Environmental Co., 308 NLRB 101 (1992) (authority to assign tasks, without

more, demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can best perform particular tasks).

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time merchandisers, relief drivers, sales service representatives, warehousemen, draft line cleaners and pre-salesmen employed by the Employer at its 3301 North Markey Avenue, Sioux Falls, South Dakota facility; excluding office clerical employees, sign makers, contemporary marketing technicians, managers, guards and supervisors as defined in the National Labor Relations Act, as amended.

DIRECTION OF ELECTION⁴

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a

⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 5, 2004**.

strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁵

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **General Drivers and Helpers Union Local 749, affiliated with the International Brotherhood of Teamsters.**

Signed at Minneapolis, Minnesota, this 22nd day of October 2004.

/s/ Robert W. Chester

Robert W. Chester, Acting Regional Director
Eighteenth Region
National Labor Relations Board
Suite 790
330 South Second Avenue
Minneapolis, MN 55401

⁵ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before close of business **October 29, 2004**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.